FILED
AUG 16 1993

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS, *et al.*,

Plaintiffs-Intervenors,

VS.

STATE OF NEW YORK,

Defendant.

RESPONSE OF THE STATE OF NEW YORK TO MOTION OF THE STATE OF DELAWARE TO STRIKE AMENDED COMPLAINTS

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August 18, 1993

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The State of New York hereby responds to the Motion of Plaintiff, State of Delaware, to Strike Amended Complaints in Intervention, filed with the Court on August 9, 1993 ("Del. Motion"). New York agrees with Delaware's arguments that the amended pleadings should be stricken because: (1) the Special Master exceeded his authority by permitting the intervenors to file amended complaints (Del. Motion at 16-19); (2) the intervenors' new claims are contrary to the express terms of the Court's limited remand instructions and thereby result in an impermissible expansion of the case (*id.* at 19-23); and

(3) the amendments are legally insufficient and untimely (*id.* at 25-33). New York does not join in Delaware's motion to the extent only that Delaware claims that its rights have been prejudiced by the proceedings before the Master thus far. *See, e.g.*, Del. Motion at 23-24.

New York filed answers to the intervenors' amended complaints on August 9, 1993, as required by the Master's Litigation Management Order No. 6 at 8 ("LMO"). In the answers, New York raised affirmative defenses which also seek dismissal of the amended complaints, *inter alia*, for legal insufficiency and untimeliness. In addition, prior to filing the answers New York objected to the Master's expansion of the case beyond the terms of the Court's remand instructions as an excess of his authority. *See* New York's Motion to Modify Litigation Management Order No. 6 at 3 (July 28, 1993), referenced in the Del. Motion at 21-22. The Master denied New York's motion in LMO No. 7 at 2 (August 4, 1993).

In its opinion, the Court remanded this case to the Master for the sole purpose of allowing New York to pursue its argument under the primary rule that "reconstruct[ion]" of "the debtor *brokers'* transactions" will lead to "creditor brokers that purchased the underlying securities and were underpaid the distributions." *Delaware v. New York*, 113 S. Ct. 1550, 1561 (March 30, 1993) (per Thomas, J.), (citing Exceptions of Defendant New York 80 (emphasis on the word "brokers" supplied by the Court)). Further, and as Delaware acknowledges, it is possible to construe the remand instruction as according to the intervenors the benefit of New York's reconstruction argument by permitting them to assert primary rule claims in the context of this lawsuit in the same way:

> If New York *or any other claimant State* fails to offer such proof on a transaction-by-transaction basis or to provide some other proper mechanism for ascertaining creditors' last known addresses, the creditor's State will not prevail under the primary rule, and the secondary rule will control. *Id.* [*Pennsylvania v. New York*, 407 U.S.,] at 215, 92 S. Ct., at 2080.

Delaware v. New York, 113 S. Ct. at 1561-62 (emphasis added).

However, there is no conceivable reading of the Court's instructions which would allow the intervenors on remand to assert claims to the remittances of *non-brokerage* entities, specifically banks and depositories such as The Depository Trust Company ("DTC"). The Master's inclusion of banks and DTC within the scope of the remand proceedings violates the Court's express directions. The Court predicated the remand upon New York's contention that the debtor *brokers'* transactions can be reconstructed to identify primary rule creditors. There was no contention from New York or anyone else that such a reconstruction approach could be applied to banks and DTC.

As Delaware correctly argues, the Master's rulings in excess of his jurisdiction have resulted in a gross expansion of this case. Rather than tailoring the case to the narrow confines of the remand, the Master has redesigned the litigation, indulged the intervenors' broad discovery requests relative to banks and DTC, and paved the way for new issues and disputes for this Court to resolve. The posture of this case, under the Master's aegis, is now a far cry from the Court's remand "for proceedings consistent with this opinion and for the preparation of an appropriate decree." 113 S. Ct. at 1562.

Accordingly, New York joins in Delaware's Motion to strike the intervenors' amended complaints. Even if the Court were to deny this relief, to the extent that these pleadings assert claims to the remittances of *non-brokerage* entities (banks and DTC), those claims should be dismissed.

Dated: New York, New York
August 18, 1993

Respectfully submitted,

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